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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 305

MARIAN HEIDEMAN,

Petitioner,

vs.

WILLARD V. KELSEY, as Executor of the Will of CHARLES AVERY HILLIARD, FRANK WYMAN HILLIARD, LEAH HILLIARD and GLADYS H. GATES,

Respondents.

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO

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PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

I.

THE PETITION FOR CERTIORARI PRESENTS ONLY A QUESTION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT. IT PRESENTS NO QUESTION OF STATE CONSTITUTIONAL OR OTHER STATE LAW.

Respondents first impute to petitioner an argument that petitioner does not make and then replies to that argument.

Petitioner does not suggest, much less does she contend, that the Supreme Court of Illinois has violated any provision of Illinois' constitution

On the complete contrary, petitioner has demonstrated that Illinois' Supreme Court *fastidiously observed* and *scrupulously obeyed* Illinois' constitutional provisions that inhibit Illinois' courts of review, including her Supreme Court, from making findings of fact contrary to the verdict of a jury where there is sufficient evidence to take the case to a jury.

Nor does petitioner intimate, much less does she argue, that Illinois' Supreme Court denied her due process of law because that court departed from precedent.

What petitioner does contend and demonstrate is that she is entitled to a final finding of fact *either* from a jury *or* from a chancellor in a trial court *or* from the Supreme Court of Illinois and that she has had no such finding by any tribunal; for the jury's verdict and the decree of the trial court have been set aside but have not been superseded by any finding of the Supreme Court of Illinois.

Illinois' courts of review claim and regularly exercise the right to substitute their findings for those of a lower court in non-jury cases even though the evidence is conflicting and the lower court saw and heard the witnesses. There is nothing unconstitutional about this practice in non-jury cases even though it differs from the Federal practice.

Nor would there be the slightest tenable Federal constitutional objection to an Illinois rule that permitted reviewing court's finally to substitute their findings for those of a jury, even on disputed questions of fact, *if there were any*

such rule in Illinois. There is no Federal constitutional right to a trial by jury in any State case.

But there is no such rule and respondents do not suggest that there is.

The result is the petitioner has been denied her claims to her father's estate *with no findings against her whatever.*

It is of this *want* of findings, not of findings against her that have never been made, that she complains as denying her due process.

II.

PETITIONER MADE TIMELY ASSERTION OF HER CLAIMS OF FEDERAL CONSTITUTIONAL RIGHT.

Respondents suggest that petitioner should have claimed some Federal constitutional right at some stage earlier than in her petition for rehearing.

Ordinarily a claim of Federal constitutional right must be raised before, not after, judgment.

But in the third opinion of the Supreme Court of Illinois, that court had held that petitioner's case entitled her to the suffrage of a jury. She could not anticipate that the court would repudiate the "law of the case" on its fourth opinion.

She could and did anticipate that the Supreme Court of Illinois would hold that on her fourth trial she had introduced no evidence raising a question of fact. She addressed this contention in her briefs. But she could not foresee that the Supreme Court of Illinois would hold that there was a question for a jury, as it did hold, and then deny her a jury's verdict without making any independent findings of its own.

It is therefore respectfully submitted that certiorari should be granted.

Respectfully submitted,

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